Ismail bin Abd Halid & Ors v National Union of Newspaper Workers

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-424-1990
MAHADEV SHANKAR J
6 FEBRUARY 1991

Labour Law *— Trade union — Constitution and rules — Dispute between union and members — Refusal of branch committee members to take oath of secrecy — Committee members suspended and prevented from attending biennial delegates conference — Whether suspension lawful — Trade Unions Act 1959 ss 44, 45 & 46*

Administrative Law *— Rules of natural justice — Suspension of members of trade union — Members not given notice of intention to suspend and had no opportunity of being heard — Whether suspension lawful or against rules of natural justice*

Arbitration *— Stay of proceedings — Application — Onus on party making application — Principles applicable — Whether there was a step in the action — Arbitration Act 1972 s 6*

Arbitration *— Arbitrators — Appointment — Validity of meeting at which arbitrators were appointed — Whether panel of arbitrators properly constituted*

The first and second plaintiffs were the branch chairman and secretary, respectively, of the New Straits Times Group ('NST group') branch of the defendant union ('the Union'), whereas the third to the twelfth plaintiffs were the branch committee members. Subsequent to their election to office, the plaintiffs refused to take the oath of secrecy required of them on the ground that it was ultra vires the Union's constitution. Following two executive council ('exco') meetings, the first at which the NST group branch was unrepresented and the second, which the second plaintiff was asked by the Union's general secretary not to attend, the plaintiffs received a letter each from the Union's general secretary informing them that they had been suspended with immediate effect. The plaintiffs filed an application for a declaration that their suspension was void. The Union filed for a stay of the proceedings pending arbitration as provided for in the Union's constitution.

Held, allowing the plaintiffs' application:

(1) A meeting would be illegal if notice of that meeting was not given to persons who were legally entitled to attend it. The position was the same where after giving notice, the person was deliberately excluded from attending and more so if decisions were to be taken which were adverse to his interests. Apart from the second plaintiff, the other plaintiffs were not given notice of any impending action against them. The second plaintiff on the other hand was prevented from attending, and there was no enquiry held before suspension was implemented. The decision to suspend was therefore void ab initio.

(2) It was open for the plaintiffs to come to court without first exhausting their domestic remedies as the decision to suspend them was a nullity and void ab initio and because the exco acted beyond its jurisdiction in a manner wholly unauthorized by its constitution.

(3) The onus was on the Union to show sufficient reason why the matter had to be referred to arbitration and here there was no affidavit filed to contravene the facts stated by the plaintiffs. If the party applying for a stay makes it clear before he joins issue on the merits that he is doing so without prejudice and subject to his insistence on the arbitration clause, that course would not amount to a step in the action and would not have defeated the application for stay.

(4) The effect of holding the suspension void ab initio was to invalidate the sixth biennial delegates' conference ('the sixth BDC') also, and with it must fall the attempt to institute a new panel of arbitrators. There was never any properly constituted panel of arbitrators in this case, moreover the panel of arbitrators were appointed at the impugned sixth BDC which was not legally constituted as eight of the 12 plaintiffs, who were legally entitled to attend, were precluded from attending as a result of their suspension.

[Bahasa Malaysia summary

Plaintif pertama adalah pengerusi cawangan Kumpulan New Straits Times ('kumpulan NST') kesatuan defendan ('Kesatuan itu') dan plaintif kedua adalah setiausaha cawangan tersebut, manakala plaintif-plaintif yang lain adalah ahli jawatankuasa cawangan itu. Selepas pilihan mereka ke jawatan masing-masing, plaintif enggan mengangkat sumpah kerahsiaan yang mereka dikehendaki mengambil, atas alasan bahawa ia ultra vires perlembagaan Kesatuan itu. Berikutan dua mesyuarat majlis eksekutif, di mana pada mesyuarat pertama, cawangan kumpulan NST tidak diwakili dan pada mesyuarat kedua, plaintif telah diminta oleh setiausaha agung Kesatuan itu supaya tidak menghadirinya, kesemua plaintif telah menerima sepucuk surat masing-masing daripada setiausaha agung Kesatuan itu yang memberitahu mereka bahawa mereka telah digantung daripada jawatan mereka dengan segera. Plaintif telah memfailkan suatu permohonan untuk deklarasi bahawa pergantungan jawatan mereka adalah tidak sah. Kesatuan itu telah memfailkan permohonan untuk penangguhan prosiding sementara menanti keputusan timbangtara sebagaimana yang diperuntukkan dalam perlembagaan Kesatuan itu.

Diputuskan, membenarkan permohonan plaintif itu:

(1) Sesuatu mesyuarat akan menyalahi undang-undang jika notis mengenai mesyuarat itu tidak disampaikan kepada sesiapa yang berhak menghadirinya di sisi undang-undang. Kedudukannya sama di mana, selepas notis diberi, seseorang itu sengaja dihalang

daripada menghadirinya, lebih-lebih lagi jika keputusan akan diambil yang akan memudaratkan kepentingannya. Selain daripada plaintif kedua, plaintif yang lain tidak diberikan notis mengenai sebarang tindakan yang bakal diambil terhadap mereka. Plaintif kedua pula dihalang daripada menghadiri mesyuarat, dan tidak ada siasatan diadakan sebelum penggantungan jawatan dikuatkuasakan. Oleh itu, keputusan untuk menggantung itu adalah tidak sah ab initio.

(2) Adalah terbuka kepada plaintif untuk membawa tindakan terus ke mahkamah tanpa menghauskan remedi dalaman terlebih dahulu oleh kerana keputusan menggantung jawatan itu adalah batal dan tidak sah ab initio dan juga kerana majlis eksekutif telah bertindak di luar bidang kuasanya dalam cara yang tidak dibenarkan langsung oleh perlembagaannya.

(3) Beban terletak pada Kesatuan itu untuk menunjukkan sebab yang memadai mengapa perkara tersebut patut dirujuk untuk timbangtara dan di sini, tidak ada afidavit yang difailkan untuk melawan fakta yang dinyatakan oleh plaintif. Jika pihak yang memohon penangguhan prosiding menyatakan dengan jelas sebelum beliau mencantumkan isu atas merit, bahawa beliau berbuat demikian tanpa menjejaskan dan tertakluk kepada desakan beliau mengenai fasal timbangtara, langkah itu tidak akan dianggap sebagai suatu langkah dalam tindakan dan tidak akan mengecewakan permohonan untuk penangguhan itu.

(4) Akibat keputusan bahawa penggantungan itu tidak sah ab initio, persidang perwakilan dwi-tahunan yang keenam itu juga tidak sah, dan dengan itu, percubaan untuk melantik panel penimbangtara baru juga gagal. Dalam kes ini, langsung tidak ada suatu panel penimbangtara yang ditubuhkan dengan wajarnya, lagipun panel itu telah dilantik di persidangan perwakilan dwi-tahunan yang dipersoalkan itu yang tidak diadakan dengan sah oleh kerana lapan daripada 12 plaintif yang berhak menghadiri persidangan itu dihalang daripada menghadirinya disebabkan pergantungan jawatan mereka.]

Notes

For cases on arbitration in trade disputes, see 8 *Mallal's Digest* (4th Ed) paras 369–386.

For cases on stay of proceedings pending application for arbitration of dispute, see 1 *Mallal's Digest* (4th Ed) paras 627–629, 633–635.

Cases referred to

1 *B Mahesan v KK Lim* [1987] 2 MLJ 160 (folld)
2 *Burn v National Amalgamated Labourers' Union of Great Britain & Ireland* [1920] 2 Ch 364 (refd)
3 *Lawlor & Ors v Union of Post Office Workers* [1965] 1 Ch 712; [1965] 1 All ER 353; [1965] 2 WLR 579 (folld)
4 *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440; [1967] 3 All ER 70; [1967] 3 WLR 896 (refd)

5 *John v Rees & Ors* [1970] Ch 345; [1969] 2 All ER 274; [1969] 2 WLR 1294 (refd)
6 *Young v Ladies Imperial Club, Ltd* [1920] 2 KB 523 (refd)
7 *Kolandaisamy v Annamalai and The Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 MLJ 222 (distd)
8 *Muthuraku v Kuala Lumpur Municipality Workers Trade Union* [1973] 1 MLJ 206 (folld)
9 *AR Fernandez & Ors v National Union of Bank Employees* [1986] 2 MLJ 135 (refd)
10 *Re National Union of Commercial Workers; Wong Yoon Leong & Ors v S Balasingam & Ors* [1974] 1 MLJ 172 (refd)
11 *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 (refd)
12 *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 (distd)
13 *Syarikat Joginder Singh v Lai Swee Lim* (Kuala Lumpur High Court Originating Motion No R8–32–117–87) (unreported) (distd)
14 *Sasa Musa Sugar Works Ltd v Shobrati Khan* AIR 1959 SC 923 (distd)
15 *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors* [1990] 3 MLJ 231 (folld)

Legislation referred to
Arbitration Act 1972 s 6
Trade Unions Act 1959 ss 38, 44, 45, 46

R Sivarasa (*Zain & Co*) for the plaintiffs.
Dato' G Vadiveloo (*Dr Thambirajah* with him) (*Thambirajah & Associates*) for the defendant.

Cur Adv Vult

Mahadev Shankar J: The plaintiffs are applying for a declaration to annul the suspension of their union membership, and the sixth biennial delegates' conference ('the sixth BDC') held shortly thereafter.

The defendant union ('the Union') covers the newspaper workers employed in several companies which publish almost all the Bahasa Malaysia, English, Chinese and Tamil newspapers in Peninsular Malaysia. This case concerns the problems between the Union's executive council ('exco') and the branch representatives of the New Straits Times Group ('the NST group').

Rule 26(1) of the Union's constitution provides for intra-Union disputes to be jointly referred to the Director General of Trade Unions with the consent of all parties to the dispute. Failing that, the aggrieved party could, under r 26(3) choose three arbitrators from a panel of five. This panel was appointed by the fifth biennial delegates' conference ('the fifth BDC'). Vacancies could be filled at subsequent delegates' conferences. The first five so appointed were Encik Zainal Rampak, Dr V David, Dr PP Narayanan, Encik A Ragunathan and Encik Mohd Abas.

A By r 12, the exco comprised eight principal officers who were elected biennially and one representative from each branch. By r 29, branch committees were to consist of four office bearers and eight committee members, who were elected biennially at the branch general meeting ('the BGM'). Of the 12 so elected, eight were designated as the branch B representatives entitled to attend the biennial delegates' conference which followed.

On 24 May 1990, Encik A Ramadasoo, the general secretary of the Union, submitted the Union's proposals for its collective agreement with the NST management. The existing collective agreement was due to expire on 31 July 1990.

C On 26 June 1990, the NST branch held its BGM. The incumbent branch chairman and branch secretary were both unseated. Only three of the remaining committee members were re-elected. The rest were all new faces. The new branch chairman and branch secretary are the first and second plaintiffs. The other committee members are the third to twelfth D plaintiffs in this action.

A day before the BGM, the general secretary had directed the outgoing and incoming committee to stand by for a committee meeting after the election.

At this committee meeting, the president and general secretary of the Union required the incoming committee to sign two oaths. One was the E oath of office. The other was the oath of secrecy. The plaintiffs took their oath of office. They declined to take the oath of secrecy, on the ground that it was unconstitutional and not provided for in the Union's constitution. No immediate protest was raised by the Union president or its general secretary about this.

F On 2 August, the general secretary gave notice of an exco meeting on 14 August 1990. One of the items on the agenda was the oath of secrecy for newly-elected exco representatives.

But the branch secretary was in Australia on leave from 31 July to 29 August. In accordance with the order of precedence laid down by r 12(2), the branch secretary was the person designated as the branch representative G on the exco. The rule suggests but does not specify that in the absence of the branch secretary, the branch chairman or others lower down in the order of precedence are entitled to step into his place and attend the meeting. In the event, the branch chairman wrote to the general secretary on 13 August expressing his regrets that the NST branch would be without H representation at this exco meeting. The general secretary, who had prior notice of the branch secretary's departure, did not invite the branch chairman to attend nor did he apply for leave for him to do so. The exco meeting therefore proceeded as scheduled, with the NST branch representative absent.

I On 29 August 1990, the general secretary on behalf of the exco issued a formal notice that the sixth BDC would be held on 27 September 1990. The same day, the general secretary wrote to the branch secretary requiring every member of the branch committee to appear before the president on 5 September 1990 and take the oath.

The branch secretary replied to this letter on 4 September, explaining their apprehensions about the implications of such an oath. He requested that the matter be discussed at the BDC since the NST branch would be tabling a resolution to that effect.

The same day, the full complement of the branch committee sent the general secretary a formal letter tabling two resolutions and five motions to be tabled at the sixth BDC. The fifth motion was that the oath of secrecy be abolished as unconstitutional.

In the midst of this, was another letter from the general secretary which seems to lack chronological consistency. His letter dated 29 August set up a meeting on 5 September for the oath taking. But the general secretary sent out another letter dated 28 August 1990, calling for another exco meeting on 12 September 1990 to discuss the oath.

The date of this letter invites inquiry because the branch secretary says he only received the letter dated 28 August, after he had sent off his responses on 4 September, to the other letter of 29 August.

Why should the general secretary send a letter on 29 August calling for an oath taking on 5 September, only to follow up with another letter on 28 August to say the matter was to be discussed on 12 September? One inference is that the ceremony fixed for 5 September had been superseded by opening the matter for discussion on 12 September. There may be others.

By this stage the issue of whether the oath of secrecy could be validly imposed by the exco on the branch committee could be categorized as an inchoate dispute between the general secretary and the branch committee. The branch secretary had a right to attend the exco meeting on 12 September.

But by letter dated 10 September 1990, the general secretary wrote to the branch secretary that his leave for12 September had been cancelled and that he was not to attend the exco meeting that day. The letter says 'we have cancelled' which suggests that this was the decision of the exco. If so, it is not clear when it was taken or by virtue of what powers a person who had a constitutional right to attend was being precluded from doing so. There was also no hint in this letter of what the exco had in mind.

On 12 September 1990, the general secretary sent a standard letter to each one of the branch committee members to say that they had been suspended with immediate effect. Five grounds were enumerated for the suspension:

(1) the refusal to take the oath on 5 September as per the directive of 29 August;
(2) associating themselves with alleged defamatory and scurrilous attacks on the Union officers in the *Union Flash* dated 12 July 1990 and a letter dated 22 August 1990;
(3) contravening r 7.3 which requires Union officials attending Union premises to behave in an orderly manner;
(4) contravening r 12.15 which provides that decisions of the exco are binding on all members until countermanded by resolution of a delegates' conference; and
(5) conduct likely to bring loss to the NSTP collective agreement.

A This suspension was said to be made pending a full-scale enquiry. But at no time had any of the plaintiffs been notified that they would be suspended if they did not take the oath. At no time were any of them given prior notice that the other matters raised in the letter were the subject of any complaint. And it needs to be emphasized, by deliberately excluding the branch secretary, all the plaintiffs were shut out from the exco meeting without an B opportunity to say anything before the decision to suspend was made.

The suspension had serious consequences. At a stroke, all the plaintiffs were deprived of their right to attend the sixth BDC to be held on 27 September. With it went their right to ventilate the issues they wished to raise including the validity of the oath they were required to take. In effect C it amounted to a coup d'etat because, on the same day, the exco gave notice to the rank and file that it had taken over the affairs of the NST group branch. On 17 September, the general secretary gave notice that the Union had commenced collective bargaining with the NST management.

The plaintiffs' solicitors wrote on 19 September, challenging the validity of these acts and demanded their reinstatement. The Union ignored the D letter and carried on with the sixth BDC as planned on 27 September 1990.

On 2 October 1990, the plaintiffs' solicitors wrote again asking for consent to a joint reference to the Director General of Trade Unions and, if such consent was not forthcoming, that three arbitrators be chosen (from the permanent panel aforesaid) on 5 October 1990.

E On 3 October 1990, the Union responded that the panel did not comprise the persons aforesaid named at the fifth BDC but by five other persons, of whom four were newly appointed at the impugned sixth BDC on 27 September, with only Encik Mohd Abas of the original panel remaining. The plaintiffs refused to accept this panel and filed this application on 15 October 1990.

F It was submitted that the decision to suspend the plaintiffs on 12 September 1990 was a nullity and void ab initio.

The power to suspend is contained in r 12(13) of the Union constitution. The critical words there are that the exco 'may *suspend* ... from holding any office, any member who in its *judgment* is guilty ...' The rule also provides suspended members the right of appeal as provided by r 26.

G In *B Mahesan v KK Lim*[1] at p 160, Mohamed Azmi SCJ said this:

> ... Although one week['s] suspension against an outstation club member even of 12 years' standing may appear as a trivial matter for the attention of the court, the principle involved is by no means trifle and unimportant, as it concerns the question of how far and to what extent the courts will interfere in the affairs of H a social club. In *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11, the Federal Court laid down the principle upon which courts would intervene in decisions of a domestic tribunal in relation to the power of expulsion of a member. Further, the principle that no distinction should be made between suspension and expulsion in relation to the rules of natural justice laid down in *Burn v National Amalgamated Labourers' Union* [1920] 2 Ch 364 was adopted by I Megarry J in *John v Rees* [1970] Ch 345 because 'in essence, suspension is merely expulsion protanto. Each is penal and each deprives the member concerned of the enjoyment of his rights of membership or office.' Although *Burn*'s case concerned a trade union we fail to see why the same principle should not in appropriate cases, apply to social clubs merely because they do not involve a

man's means of livelihood. In *Dawkins v Antrobus* (1881) 17 Ch D 615 it was held that the court would not interfere against the decision of the members of a club professing to act under their rules unless it could be shown (1) that the rules were contrary to natural justice, or (2) that what had been done was contrary to the club rules, or (3) that there had been mala fides or malice in arriving at the decision.

The cases which were cited in the above passage made it very clear, that words 'in its *judgment*' and the right of appeal, clearly imported the need for *due* enquiry *before* the suspension could be ordered. The law on this aspect of the matter is spelt out:

(a) by PO Lawrence J in *Burn v National Amalgamated Labourers' Union of Great Britain & Ireland*[2] at pp 374 and 375;
(b) by Ungoed Thomas J in *Lawlor & Ors v Union of Post Office Workers*[3] at pp 728–732; and
(c) by Stamp J in *Hiles v Amalgamated Society of Woodworkers*.[4]

The words used by Ungoed Thomas J in the passages just referred to have particular application to the facts of our case and I would respectfully adopt them.

It is also elementary law that a meeting would be illegal if notice of that meeting were not given to persons who were legally entitled to attend it. See *John v Rees & Ors*[5] at p 402, *Young v Ladies' Imperial Club Ltd*[6] and generally in *Law of Meetings* by Shaw & Smith (5th Ed) at p 63. The position can be no different, where, after notice is given, the person entitled to attend is deliberately excluded from attending and the more so if decisions are to be taken which are adverse to his interests.

Here, apart from the second plaintiff, the other plaintiffs were given no notice at all of any impending action against them, the second plaintiff was given notice that the matter was going to be discussed at the meeting on 12 September but he was prevented from attending, and there was no enquiry whatsoever before the suspension was implemented on 12 September. In all the cases cited, on similar facts, such a decision had been held to be a nullity and void ab initio.

If that be the position here, other consequences flowed from the suspension which impacted upon the validity of the BDC on 27 September. Eight out of the 12 plaintiffs were legally entitled to attend the BDC. But by virtue of the suspension they were precluded from attending.

It was at this impugned meeting that the five members previously appointed to the panel of arbitrators were replaced. The right of appeal is as provided by r 26. The Union does not appear to have got the prior consent of the five persons initially appointed. They took up the matter after the omission was drawn to their notice by the Registrar of Trade Unions. Then the Union wrote to the individuals concerned. Encik Zainal Rampak and V David confirmed acceptance. Encik Ragunathan declined on 23 March 1989. There was no written response from the other two. Vacancies in the panel could be filled at subsequent delegates conferences. It was not suggested that Encik Zainal Rampak and Encik V David had vacated their positions. Although the plaintiffs were, in the first instance,

A agreeable to go to arbitration as provided by r 26 they were not prepared to accept the replacement panel because they said that it was not legally constituted.

Again, on all the authorities previously cited, it was clear law that if the decision to suspend was a nullity and void ab initio, it was open to the B plaintiffs to come to court without first exhausting their domestic remedies. The union's response was to file an application for a stay of these proceedings as provided by s 6 of the Arbitration Act 1972 by virtue of the application of r 26 of the Union's constitution and as provided by s 44 of the Trade Unions Act 1959 ('the Act').

In view of the obvious urgency of the matter, I directed the applications C of both parties to be heard together.

Section 6 of the Arbitration Act 1972, by its very terms is a discretionary provision, under which the court will only order a stay, 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement ...' It was for the Union to satisfy the court that there were such sufficient reasons and that arbitration D was available in accordance with the terms of the rule.

The Union's counsel referred to s 38 and art 11 of the First Schedule to the Act under which it is mandatory for the Union's constitution to provide for the manner in which disputes referred to in Pt VI of the Act shall be decided. Part VI of the Act relates to disputes, and comprises ss 44–46 of E the Act. The first part of r 26 is very similarly worded to s 44(1) of the Act. Rule 26(4) is almost identically worded to s 46 of the Act. It should be noted that s 46 is an open ended definition by virtue of the use of the term 'includes'. The issue as to whether the oath of secrecy should be taken was an inchoate dispute. From the events of September, it would appear that the branch secretary had been led to believe that the matter was still under F discussion. The act of the Union in pre-empting the plaintiffs by suspending them, and the plaintiffs' challenge to the validity of this suspension, is a 'dispute' both under s 46 of the Act and under r 26(4) since the question is whether the plaintiffs were entitled to continue to be regarded as members notwithstanding the purported suspension on 12 September.

G The Union submits that the combined effect of ss 44(1) and 46 of the Act and r 26 is to make it incumbent upon the plaintiffs to resort to arbitration. The Union relies on *Kolandaisamy v Annamalai and The Harbour Trade Union (Selangor) Port Swettenham.*[7] This case was initiated by way of a writ. The claim was for a declaration that the plaintiff was still a member of his union and the election of the executive council was void. The dispute H arose out of conflicting interpretations of the rules. The court was concerned with Pt VI of the Trade Unions Ordinance 1959 ('the Ordinance') and corresponding provisions in the Union's constitution which were all similar to those found in our case. Gill J, sitting at first instance, held that the court had *no jurisdiction* to hear and adjudicate and that the dispute should be I referred to arbitration as provided by the Ordinance and the various rules.

This decision was distinguished by Ong CJ in *Muthuraku v Kuala Lumpur Municipality Workers Trade Union.*[8] Here, the complaint was that an emergency general meeting of the union had no power to decide matters

pertaining to the election of officers of the union. The same sections of the Ordinance and similar rules in the union's constitution had to be interpreted and applied. But it was pointed out that in *Kolandaisamy*'s case,[7] there was in existence a panel of arbitrators and the union had pleaded that fact in its defence. In *Muthuraku*'s case,[8] there was no such panel of arbitrators and arbitration was out of the question. Ong CJ said at p 207I, 'Herein lies the essential difference between these two cases and the reason why we have allowed this appeal'.

Pausing here for a moment, it seems to me, with respect, that there is a distinction between saying there is no jurisdiction and saying that there is jurisdiction which the court should disclaim in a particular matter.

This point was brought out in *AR Fernandez & Ors v National Union of Bank Employees*.[9] The plaintiffs were officers in the various banks in which they were employed and, in that capacity, were members of the defendant union. The rules of the union were amended to confine membership to clerical and non-clerical staff. The plaintiffs brought this action by writ for a declaration that their exclusion was ultra vires and illegal and claimed an injunction. The Union raised a preliminary objection that the dispute should be referred to arbitration. The High Court judge made an order that it be so referred. From what I can see, the Supreme Court set aside that order because the union had not stated in its affidavit in support of the preliminary objection that it was ready and willing to do all things necessary for the proper conduct of the arbitration. The injunction was refused but the trial was allowed to proceed on the claim for the declaration and any damages the plaintiffs may have suffered.

Next, I was referred to *Re National Union of Commercial Workers; Wong Yoon Leong & Ors v S Balasingam & Ors*.[10] This was an originating summons. The plaintiffs were asking for a declaration that a resolution postponing the biennial delegates' conference was ultra vires the union's rules. Breach of the rules of natural justice was urged, but the dispute turned on the interpretation of the rules. The court held that the dispute should be referred to arbitration, and that as there were serious questions of fact, the action should not have been commenced by originating summons.

With respect to counsel for the Union, there is nothing in the Act or in the rules of the Union which can be regarded as an ouster of the jurisdiction of this court. Indeed, it seems to me that there may be a great number of cases where arbitration may well be the proper route to take because the dispute turns on irregularities or mere matters of interpretation and the like. But there are also cases where the non-observance of the rules of natural justice are so flagrant that one is compelled to the conclusion that the decision so reached is the very abnegation of justice, and therefore void ab initio.

Although this is a matter initiated by way of an originating summons, it is manifestly obvious that all the facts relied upon by the plaintiffs are documented in an exchange of letters and documents which cannot be denied. Indeed, there is no affidavit filed by the Union on record denying any of the facts averred by the plaintiffs. In accordance with the well-established rules therefore, these facts must be taken as admitted. Counsel

for the Union sought to submit that no affidavit was filed to controvert the facts stated by the plaintiffs because that would be tantamount to taking 'a step in the action' which would have defeated the application for a stay.

With respect, I regret I am unable to agree. The onus cast by s 6 of the Arbitration Act 1972 to show sufficient reason why the matter had to be referred to arbitration was upon the Union. Where the circumstances were such that it was not enough to make a bald reference to the existence of the arbitration clause, it was for the party insisting on the arbitration to show why that should be so. Arbitration is but a means to an end. Whether the parties should be compelled to take that route to resolve their dispute or whether it should be done by the court is a problem which may require consideration of a variety of other facts. Provided the party applying for a stay makes it clear *before* he joins issue on the merits, that he is doing so without prejudice to and subject to his insistence on the arbitration clause, that should not amount to a step in the action. In *Pitchers Ltd v Plaza (Queensbury) Ltd*[11] which the Union's counsel cited, the application for stay was only made long after issue had been joined on the merits, by which time it was held to be too late. The propriety of a court dealing simultaneously with both the application for stay and the merits, if a stay is refused, is specifically referred to in the last paragraph of the judgment of Goddard LJ at p 156A–B.

Another point taken by the Union was that the failure to hold an enquiry was not fatal. Reliance was placed upon *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi*[12] and *Syarikat Joginder Singh v Lai Swee Lim*.[13] These are master and servant cases, and for the reasons spelt out by Wan Suleiman SCJ in the former, at p 115:

> ... the right to a hearing or as it is sometimes called the observance of procedural safeguards are only applicable in respect of a hearing before an administrative tribunal and similar quasi-judicial tribunals performing judicial functions but do not apply to simple master-servant proceedings...

In the latter decision, the employee in fact was given a hearing at which she confessed to the ground on which she was dismissed. The union's counsel also submitted on the basis of *Sasa Musa Sugar Works Ltd v Shobrati Khan*,[14] that a suspension by itself was not a punishment. But that case refers to the suspension of an employee who continues to receive full pay. Here, we are dealing with a suspension of the Union members who were immediately penalized by being stripped of all their rights of representation as elected office bearers and of their privileges as Union members.

In the present case, I hold that it was incumbent upon the exco council of the defendant to hold due enquiry before they arrived at their judgment to suspend the plaintiffs. That they failed to do, because they did not give the plaintiffs due notice of their intention to take such a decision, and they gave them no opportunity whatsoever reasonable or at all of being heard. When the general secretary received the branch secretary's letter of 4 September on the subject, he was aware that all the plaintiffs had reservations about taking the oath of secrecy. They gave notice that they were going to ventilate these reservations at the BDC on 28 September.

They could have been given a chance to state them at the exco meeting on 12 September 1990. They were not. The decision to suspend was therefore void ab initio.

As for the need to refer to arbitration, I hold that in such a case as this, it was quite open to the plaintiffs to come forthwith to the courts, without having to exhaust their domestic remedies because the exco acted beyond its jurisdiction in a manner wholly unauthorized by its own constitution. I consider myself bound by the principles stated by Mohd Azmi SCJ in *B Mahesan v KK Lim*[1] at p 161 and I would with respect adopt and follow what was said by Edgar Joseph Jr J (as he then was) in *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors*[15] at p 237 last paragraph to p 238E (right). As to the efforts of defence counsel to distinguish these cases on the ground that they dealt with different entities, one needs to bear in mind that the rules of natural justice are concerned with principles and not with personalities.

There is a subsidiary ground on which the application for arbitration must be refused. The effect of holding the suspension void ab initio is to invalidate the sixth BDC also, and with it must fall the attempt to institute a new panel of arbitrators. There was never any properly constituted panel of arbitrators in this case with the result that *Muthuraku*'s case[8] on this point becomes directly applicable.

One of the plaintiffs' prayers in this matter is a claim for damages. In the proceedings before me, no submissions were made to the court on this point, and indeed there is no evidence in any of the plaintiffs' affidavits dealing with any financial loss the plaintiffs or any of them may have suffered. The general secretary and the president and other officers of the exco may or may not have taken the view that they were acting in the best interests of the Union in insisting on the oath of secrecy. To the extent that in the minds of the plaintiffs, the exco had prejudged the issue, the latter could be said to be a tribunal which was not entirely free from bias. But in the opinion of this court there is nothing to support a claim for damages and therefore no award can be made on this head.

I therefore now order as follows:

(1) satu deklarasi bahawa penggantungan keahlian plaintif-plaintif pada 12 September 1990 adalah menyalahi undang-undang, tidak sah dan terbatal;
(2) satu deklarasi bahawa persidangan perwakilan dwi-tahunan yang keenam (sixth biennial delegates' conference) yang diadakan pada 27 September 1990 adalah menyalahi undang-undang, tidak sah dan terbatal;
(3) satu perintah bahawa defendan memanggil semula persidangan perwakilan dwi-tahunan yang keenam dalam masa lima minggu daripada tarikh perintah; dan
(4) kos.

Order accordingly.

Reported by Aslam Zainuddin